84-98

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The Court Of Criminal Appeals Of Texas

JURISDICTIONAL STATEMENT

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1 PP

I

THE QUESTION PRESENTED BY THE APPEAL

Whether the cocaine portion of the Texas Controlled Substance Act[1] is unconstitutional. That Act does not provide sufficient standards or the elements necessary to define cocaine. That Act violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

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1. Article 4476-15, Sections 2.01, 2.02 and 2.04(b)(4) of Vernon's Annotated Texas Civil Statutes.

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v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The Court Of Criminal Appeals Of Texas

JURISDICTIONAL STATEMENT

THE OFFICIAL REPORT OF ANY OPINIONS DELIVERED IN THE COURT BELOW

The opinion of the Court of Appeals is reported at 667 S.W.2d 163.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. The date of the entry of the judgment or decree sought to be reviewed is the opinion of the Court of Appeals, Fourteenth Supreme Judicial District (Court of Appeals), dated May 12, 1983. However, after that opinion was delivered, the following transpired in that Court and the Court of Criminal Appeals of Texas (Court of Criminal Appeals):

1. June 9, 1983, the opinion on Appellant's Motion for Rehearing in Court of Appeals.

2. June 30, 1983, Appellant's Second Motion for Rehearing overruled in the Court of Appeals.

3. August 11, 1983, Appellant's Second Motion for Rehearing overruled by the Court of Appeals. (Apparently, this was in response to Appellant's Motion for Rehearing En Banc.)

4. February 4, 1984, Appellant's Petition for Discretionary Review was refused by the Court of Criminal Appeals.

5. April 25, 1984, Appellant's Motion for Rehearing of his Petition for Discretionary Review was denied by the Court of Criminal Appeals.

6. May 14, 1984, Appellant's Notice of Appeal to the United States Supreme Court was filed in both the Court of Appeals and the Court of Criminal Appeals.

B. This Court has jurisdiction of this appeal under the provisions of 28 U.S.C., Section 1257(2) which provides:

> Section 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant is challenging the constitutionality of Article 4476-15, Section 2.02 and Section 2.04(b) of Vernon's Annotated Texas Civil Statutes which covers cocaine. Those sections of the statute do not provide sufficient standards or the elements necessary to define cocaine. The Court of Appeals has upheld that statute and the Court of Criminal Appeals has sustained it by refusing to consider the Petition for Discretionary Review.

THE STATUTE THAT THIS CASE INVOLVES

This case involves the question of whether the cocaine portion of the Texas Controlled Substance Act, Article 4476-15 of Vernon's Annotated Texas Civil Statutes, is constitutional as the Act does not provide sufficient standards or the elements necessary to define cocaine.

The portions of Article 4476-15 of Vernon's Annotated Texas Civil Statutes involved in this proceeding are as follows:

SUBCHAPTER 2, STANDARD AND SCHEDULES

Controlled substances

Section 2.01. The legislature determines that the substances listed in Schedules I, II, III, IV, and V and in Penalty Groups 1, 2, 3, and 4 shall be controlled substances.

Nomenclature

Sec. 2.02. The controlled substances listed or to be listed in the schedules in Schedules I, II, III, IV, and V and Penalty Groups 1, 2, 3, and 4 are included by whatever official, common, usual, chemical or trade name they may be designated.

* * *

Schedule II

Sec. 2.04. (a) Schedule II shall consist of the controlled substances listed in this section.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, however produced:

* * *

(4) Cocaine, including its salts, isomers (whether optical, position, or geometric) and salts of such isomers; coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Appellant was indicted on July 8, 1982, for possession of less than 28 grams of cocaine. This was in the 177th Judicial District Court of Harris County, Texas (Trial Court). Thereafter, Appellant filed "Defendant's First Motion to Dismiss the Indictment" and this motion was presented to and heard by the Trial Court prior to the Appellant's announcement of ready for trial. That Motion to Dismiss alleged that Article 4476-15 of Vernon's Annotated Texas Civil Statutes was unconstitutional and, specifically, Article 4476-15, Section 2.04(b)(4) which covers cocaine was unconstitutional. That motion pointed out that the statute in question did not define what constitutes the contents of cocaine and that the Texas statute does not set out any standard as to what constitutes cocaine and it does not define the contents or the elements necessary to constitute cocaine. The way the statute is written a person must speculate as to whether a particular substance or compound would constitute cocaine. That motion stated that the Texas statute which covers the possession of cocaine is a violation of the due process clause of the United States Constitution and of the Texas Constitution as the Appellant is forced to speculate, at peril of criminal charges being filed against him, whether his conduct is prohibited. The cases of *Dunn v. United States,* 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) and *United States v. Harris,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954) were cited as authorities in that Motion to Dismiss. After a hearing on that motion, the Trial Court overruled it. Thereafter, Appellant entered a plea of nolo contendere and was

sentenced to two years in the Texas Department of Corrections.

On appeal to the Court of Appeals, Fourteenth Supreme Judicial District of Texas (Court of Appeals), that point was presented in Point of Error No. 5. The Court of Appeals affirmed the conviction. Within the time allowed by law, the Appellant filed his Petition for Discretionary Review with the Court of Criminal Appeals of Texas (Court of Criminal Appeals) and the constitutionality of the cocaine portion of the Texas statute was presented to that Court. The Court of Criminal Appeals refused to grant discretionary review. On April 25, 1984, that Court issued its order overruling the Appellant's Motion for Rehearing. On or about May 14, 1984, Appellant filed his Notice of Appeal to the United States Supreme Court in both the Court of Appeals and the Court of Criminal Appeals as he was uncertain in which court that the Notice of Appeal should be filed.

THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BECAUSE IT IS A DENIAL OF THE BASIC ELEMENTS OF DUE PROCESS

Prior to the Appellant's announcement of ready for trial, he filed in the Trial Court his First Motion to Dismiss the Indictment and the basis of that motion was that the cocaine portion of the Texas statute did not set out any standard or the elements necessary to define cocaine and that the statute as written violated the due process clause of the United States Constitution. That motion was overruled and the Defendant entered his plea of nolo contendere before the Trial Court and he was

convicted and assessed two years in the Texas Department of Corrections. The Trial Court gave to him the right to appeal. Also, Article 44.02 of the Texas Code of Criminal Procedure provides that a defendant in a criminal action can appeal on any motions that were presented to the trial court prior to trial.

The constitutional question of the cocaine portion of the Texas statute was presented to both the Texas intermediate court, the Court of Appeals, and the highest Texas court on criminal matters, the Court of Criminal Appeals of Texas, and that question was rejected by those courts.

The Texas Controlled Substance Act is covered in Article 4476-15 of Vernons Annotated Texas Civil Statutes. Article 4476-15, Section 2.04(b)(4) covers cocaine.

Subchapter 2 of Article 4476-15 covers standards and schedules and provides:

SUBCHAPTER 2, STANDARD AND SCHEDULES

Controlled substances

Section 2.01. The legislature determines that the substances listed in Schedules I, II, III, IV, and V and in Penalty Groups 1, 2, 3, and 4 shall be controlled substances.

Nomenclature

Sec. 2.02. The controlled substances listed or to be listed in the schedules in Schedules I, II, III, IV, and V and Penalty Groups 1, 2, 3, and 4 are included by whatever official, common, usual, chemical or trade name they may be designated.

* * *

Schedule II

Sec. 2.04. (a) Schedule II shall consist of the controlled substances listed in this section.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, however produced:

* * *

(4) Cocaine, including its salts, isomers (whether optical, position, or geometric) and salts of such isomers; coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

Section 2.02 which attempts to define cocaine by whatever official, common, usual, chemical or trade name that it may be designated tells you nothing. The statute does not set up any standards and it does not define the contents or the chemical contents of cocaine. It does not define or state the ingredients that make up cocaine. It does not define what constitutes cocaine. The way the statute is written a person must speculate as to whether a particular substance or compound would constitute cocaine. A person is put in the position of speculating what the Texas Legislature meant when they enacted the above statute.

The Texas statute which covers the possession of cocaine is a violation of the due process clause of the United States Constitution and the Texas Constitution as the defendant is forced to speculate, at peril of criminal charges being filed against him, whether his conduct is prohibited. *Dunn v. United States,* 442 U.S. 100, 112,

99 S.Ct. 2190, 2197, 60 L.Ed.2d 743 (1979). On Page 2197, this Court said:

> ". . . Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931). Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. *United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 410, 61 L.Ed. 857 (1917)."

A criminal statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute", *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). In *United States v. Echols*, 677 F.2d 498 (5th Circuit, 1982), the Court said on Page 499:

> " 'Fundamental principles of due process . . . mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.' *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743 (1979). A criminal statute must 'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.' *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). . . ."

In *State of Texas v. Shopper's World, Inc.*, 380 S.W. 2d 107 (Supreme Court of Texas, 1964), the Court said on Page 111:

> "It is well settled that a penal statute may be so vague and indefinite that it violates the rights guaranteed to an accused by Sec. 10, Art. 1, Texas Constitution, Vernon's Ann. St., to 'demand the nature and cause of the accusation against him'. *Griffin v. State*, 86 Cr. Rep. 498, 218 S.W. 494; *Ex parte Slaughter*, 92 Cr. Rep. 212, 243 S.W. 478, 26 A.L.R. 891. . . ."

In *Ex parte Slaughter*, 243 S.W. 478 (Court of Criminal Appeals of Texas, 1922), the Court said on Page 479:

> " 'But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. . . . There must be some definiteness and certainty.' "

In *Lone Gas Company v. Kelly*, 165 S.W.2d 466 (Comm. of Appeals of Texas, 1942), the Court said on Page 448:

> ". . . As stated by the Supreme Court of the United States, 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322."

To the same effect *Ex parte Chernosky*, 217 S.W.2d 673 (Court of Criminal Appeals of Texas, 1949); *Spige-*

ner v. State of Texas, 314 S.W.2d 832 (Court of Criminal Appeals of Texas, 1958).

Respectfully submitted,

DOUGAL C. POPE
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

CERTIFICATE OF SERVICE

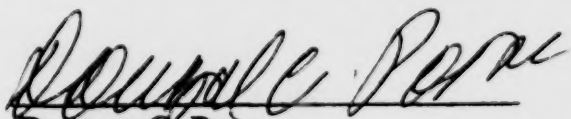
Three copies of the foregoing were served on all parties required to be served and they were mailed to each of the following on the 16 day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelopes:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

Certified Mail #3881872
Return Receipt Requested

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Certified Mail #3881873
Return Receipt Requested



DOUGAL C. POPE

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

APPENDIX

DOUGAL C. POPE
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2317 Bissonnet
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APPENDIX

The only written opinion concerning the question of whether the cocaine portion of the Texas statute is constitutional is in the opinion dated May 12, 1983, of the Court of Appeals, Fourteenth Supreme Judicial District of the State of Texas (Court of Appeals) reported at 667 S.W.2d 163. A copy of that opinion is as follows:

Affirmed, and Opinion filed May 12, 1983.

B14-82-589-CR

BENJAMIN ALLEN POPE, Appellant

vs.

THE STATE OF TEXAS, Appellee

Appeal from the 177th District Court
of Harris County
Cause No. 359,431

Following appellant's conviction on a plea of *nolo contendere* for possession of cocaine where punishment of two years was assessed in accordance with a plea negotiation, the trial court at first denied and then granted appellant the right to appeal. We affirm.

In his first two grounds of error, appellant contends there was no evidence or insufficient evidence of guilt. He argues that since "the Statement of Facts does not show that [the signed stipulation of evidence] was ever offered in evidence" nor is it "shown as an exhibit to

the Statement of Facts" there is no evidence to support the plea. We disagree. After the court carefully admonished appellant of the consequences of his plea of *nolo contendere,* the following occurred:

> THE COURT: I will accept the plea and hear the evidence.
>
> MR. VALLEJO (the prosecutor): At this time the state will offer what is before the court in the form of stipulation of evidence, which has been freely and voluntarily signed by the defendant on advice and consent of his counsel; if there's no objection, the state rests.
>
> MR. GAY (defense counsel): No objection.
>
> THE COURT: Do you agree to the facts stated in the stipulation?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is there evidence in defense?
>
> MR. GAY: None, Your Honor.

Included within the clerk's transcript is the form document "WAIVER OF CONSTITUTIONAL RIGHTS, AGREEMENT TO STIPULATE, AND JUDICIAL CONFESSION", signed by appellant, his counsel, and the prosecutor by which appellant waived trial by jury, appearance of witnesses, and self-incrimination. It also included his sworn stipulation of facts in support of the allegations of the indictment. The form further contains the prosecutor's consent to waiver of jury trial and his approval of the stipulated evidence. The last entry on the form, which is signed by the trial judge, reads:

> This document was executed by the defendant, his attorney, and the attorney representing the state, and then filed with the papers of the case. The defendant then came before me and I approved the above and the defendant entered a plea of *nolo contendere*. After I admonished the defendant of the consequences of his plea, I ascertained that he entered it knowingly and voluntarily after discussing the case with his attorney. It appears that the defendant is mentally competent and the plea is free and voluntary. I find that defendant's attorney is competent and has effectively represented the defendant in this case. I informed the defendant that I would not exceed the agreed recommendation as to punishment.

The above procedure used to introduce a stipulation of evidence and the attack on the sufficiency of the evidence are identical to that which was before this court in *James v. State,* 643 S.W.2d 439 (Tex. App.—Houston [14th Dist.] 1982) *pet. ref'd,* 640 S.W.2d 910 (Tex. Crim. App. 1982). There, it was held that the evidence was sufficient to support the plea. Appellant's first two grounds of error are overruled.

In his third and fourth grounds of error, appellant complains of a lack of speedy trial—the third asserting rights under TEX. CODE CRIM. PROC. ANN. arts. 32A.01, *et seq.* (Vernon Supp. 1982-1983) (Texas Speedy Trial Act) and the fourth asserting rights under both the federal and state constitutions. The state, relying upon cases where the plea was guilty, asserts these issues were waived when appellant entered a plea. On the other hand, appellant argues that, unlike entering a plea of guilty, an accused may enter a plea of *nolo contendere* and thereby preserve his contention of lack of a speedy trial.

The Court of Criminal Appeals has already decided the issue adversely to appellant's contention in *Fleet v. State*, 607 S.W.2d 257 (Tex. Crim. App. 1979). We also hold that a plea of *nolo contendere*, just as a plea of guilty, knowingly made waives all non-jurisdictional defects, including a claimed deprivation of the constitutional right to a speedy trial. *Chapman v. State*, 525 S.W.2d 8 (Tex. Crim. App. 1975). Appellant's third and fourth grounds of error are overruled.

In his fifth ground of error, appellant contests the constitutionality of the Texas Controlled Substance Act because it does not "set out any standards as to what constitutes the contents of cocaine and the Act does not define the contents of cocaine". In supporting argument, appellant states that without a statutory definition a person must speculate "whether a particular substance or compound would constitute cocaine". We are unimpressed with this argument. The term "cocaine" is commonly understood to be a narcotic drug. The *American Heritage Dictionary of the English Language* 256 (New College ed. 1976) defines "cocaine" as "[A] colorless or white crystalline narcotic alkaloid, $C_{17}H_{21}NO_4$, entracted from coca leaves and used as a surface anesthetic." It could hardly be argued that had the statute contained this or any other similar definition it would reduce the ordinary person's speculation that the substance was cocaine. The bottom line is the statute must be sufficiently definite so that a person of *common intelligence* can determine with reasonable precision what conduct it is he must avoid under the statute. *Campos v. State*, 623 S.W.2d 657 (Tex. Crim. App. 1981). We hold that the failure to define "cocaine" does not

render the statute defective nor unconstitutionally vague. Appellant's fifth ground of error is overruled.

The judgment is affirmed.

/s/ Sam Robertson
Associate Justice

Judgment Rendered and Opinion filed May 12, 1983.

Panel consists of Associate Justices Pressler, Robertson and Cannon. Associate Justice Cannon not participating.

The Court of Appeals filed a written opinion on June 9, 1983, and August 11, 1983, but those opinions did not refer to the constitutionality of the statute in question but they referred to whether the Defendant was entitled to the provisions of the Texas Speedy Trial Act. The Court of Criminal Appeals of Texas (Court of Criminal Appeals) did not render any written opinion on the Appellant's Petition for Discretionary Review and his Motion for Rehearing.

A copy of the Notice of Appeal which was filed on or about May 14, 1984, in both the Court of Appeals and the Court of Criminal Appeals is as follows:

NO. B-14-82-589-CR

COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS
HOUSTON, TEXAS

BENJAMIN ALLEN POPE, Appellant,

vs.

STATE OF TEXAS, Appellee.

APPELLANT'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

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1. The party taking the appeal:

Benjamin Allen Pope, the Appellant

2. The date of the entry of the judgment appealed from and the judgment or order appealed from are as follows:

Date	*Judgment or Order*
5/12/83	Opinion affirming Trial Court's judgment.
6/9/83	Opinion on Appellant's Motion for Rehearing.
6/30/83	Appellant's Second Motion for Rehearing overruled without a written opinion.
8/11/83	Opinion on Appellant's Second Motion for Rehearing. (Apparently, this was in response to Appellant's Motion for Rehearing en banc.)
2/8/84	Appellant's Petition for Discretionary Review was refused in Cause No. 887-83, Court of Criminal Appeals of Texas, Austin, Texas, Benjamin Allen Pope, Appellant vs. State of Texas, Appellee.
4/25/84	Denial of Appellant's Motion for Rehearing of his Petition for Discretionary Review. This was in Cause No. 887-83, Court of Criminal Appeals of Texas at Austin, Texas, Benjamin Allen Pope, Appellant vs. State of Texas, Appellee.

3. This appeal is taken to the United States Supreme Court under the provisions of 28 U.S.C. § 1257(2) which provides the right of appeal where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution and the decision is in favor of its validity.

4. The Appellant is uncertain whether the Notice of Appeal should be filed in Cause No. B-14-82-589-CR in the Court of Appeals for the Fourteenth Supreme

Judicial District of Texas at Houston, Texas, or in Cause No. 887-83 in the Court of Criminal Appeals of Texas at Austin, Texas, Benjamin Allen Pope, Appellant vs. State of Texas, Appellee. The Court of Criminal Appeals of Texas refused to grant Appellant's Petition for Discretionary Review. Therefore, Appellant is filing a Notice of Appeal in both the Court of Appeals in Cause No. B-14-82-589-CR and also in the Court of Criminal Appeals under Cause No. 887-83, Benjamin Allen Pope, Appellant vs. State of Texas, Appellee.

Respectfully submitted,

DOUGAL C. POPE, 1612-8000
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

CERTIFICATE OF SERVICE

A copy of the foregoing was served by certified mail, return receipt requested, by mailing same on the 14th day of May, 1984, to each of the following:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

Certified Mail No. 3881853
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State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Certified Mail No. 3881854
Return Receipt Requested

DOUGAL C. POPE

CERTIFICATE OF SERVICE

Three copies of the foregoing were served on all parties required to be served, and they were mailed to each of the following on the 16 day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelopes:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

Certified Mail #3881872
Return Receipt Requested

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Certified Mail #3881873
Return Receipt Requested

Dougal C. Pope

DOUGAL C. POPE

84-98

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ALEXANDER L. STEVAS,
CLERK

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Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The Court of Criminal Appeals of Texas

SUPPLEMENT TO APPENDIX

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Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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APPENDIX A

Motion Denied, and Opinion filed June 9, 1983.

No. B14-82-589-CR

BENJAMIN ALLEN POPE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the 177th District Court
of Harris County
Cause No. 359,431

OPINION ON APPELLANT'S MOTION FOR REHEARING

On the day before the opinion in this case was rendered, the Court of Criminal Appeals rendered its opinion in *Martin v. State,* No. 859-82 (Tex. Crim. App. May 11, 1983) (not yet reported). Since such decision overruled its previous line of cases holding an accused waived his right to appellate review of his rights under the Texas Speedy Trial Act by pleading guilty, it now becomes necessary to address the merits of appellant's third ground of error.

Appellant was arrested on February 19, 1982, and charged by complaint with the felony offense of possession of the controlled substances methamphetamine, hydromorphone, and marijuana. He appeared in the 177th Judicial District Court on February 22, 1982 for a probable cause hearing. The following chronology is what occurred thereafter:

Date	*Action*
2-22-82	Agreed setting signed by counsel for state and defense setting matter for examining trial on 2-26.
2-26-82	Agreed setting for presentation to grand jury on 3-5 and arraignment on 3-10.
3-10-82	Agreed setting for arraignment on 3-24.
3-25-82	Agreed setting for arraignment on 4-13.
4-07-82	Appellant indicted in Cause No. 350,662.
4-13-82	Agreed setting for pre-trial hearing on 4-22
4-22-82	Seven pre-trial motions filed, two of which were motions to dismiss on other than speedy trial grounds.
4-22-82	Agreed setting for hearing on motion for 5-25 and trial on 6-28.
6-28-82	Three motions to dismiss filed, one of which was based upon lack of speedy trial.
6-28-82	Agreed trial setting for 7-12.
7-08-82	Appellant reindicted for same transaction under Cause No. 359-431 except that first paragraph alleged possession of cocaine instead of methamphetamine.
7-12-82	Agreed setting for hearing motions on 8-9 and for trial on 8-16.

Date	*Action*
7-14-82	Six more pre-trial motions filed by appellant, including a motion to dismiss on the basis of lack of speedy trial.
7-21-82	A notice of intent to introduce copy of letters if original not produced filed by appellant.
7-23-82	Another motion to dismiss (not on basis of speedy trial) filed by appellant.
7-27-82	Three additional motions filed by appellant.
8-09-82	Hearing on apparently all motions including his motion to dismiss for failure to provide a speedy trial.
8-16-82	Motion to dismiss indictment (not on basis of speedy trial) filed by appellant.
8-16-82	Plea of *nolo contendere* entered by appellant and punishment assessed in accordance with plea negotiations.

At the hearing on appellant's speedy trial motions on August 9, 1982, he proved through the clerk's records that neither an oral nor written notice of ready for trial had been filed by the prosecutor in the re-indicted Cause Number 359,431 and rested. The prosecutor put on no evidence, but when asked by the court if he wished to be heard, he responded the court should take judicial notice of all the agreed settings of the case and stated the "state has been ready for trial within the 120 days as provided by Speedy Trial Act." Based upon the record before us, we are unimpressed with appellant's argument that we

cannot accept the unsworn statement of the prosecutor that the state had been ready for trial within the 120-day limit of the Act. No motions were filed on behalf of the state and the first trial setting for June 28, 1982 was made on April 22, 1982, some 62 days after appellant was arrested, well within the 120-day limit. Even if the trial had been conducted on June 28th and that date was outside the 120-day limit, this would not benefit appellant since the requirement of the Act applies to prosecutorial preparedness and does not encompass the trial court and its docket. *Barfield v. State*, 586 S.W.2d 538 (Tex. Crim. App. 1979). When the prosecutor declared the state had been ready for trial within the 120-day time limit and appellant elicited no evidence in rebuttal thereof, the requirements of the Speedy Trial Act were fulfilled. *Id.* Appellant's third ground of error is overruled.

The reasoning of the Court of Criminal Appeals in *Martin* that by pleading guilty the accused does not waive the right to appellate review of a speedy trial claim under the Texas Speedy Trial Act, has no application to the waiver of an accused's constitutional right to a speedy trial because *Martin* construes the wording of the Texas statute. We remain convinced of the soundness of our original opinion disposing of appellant's fourth ground of error asserting denial of a speedy trial under the constitution.

The motion for rehearing is overruled.

/s/ Sam Robertson
Associate Justice

Judgment Rendered, and Opinion filed June 9, 1983.

Panel consists of Associate Justices Pressler, Robertson and Cannon.

APPENDIX B

COURT OF APPEALS
Fourteenth Supreme Judicial District of Texas
Harris County Civil Courts Building
Houston, Texas 77002

June 30, 1983

Hon. Dougal C. Pope
Pope & Waits
2317 Bissonnet
Houston TX 77005

Richard Mason
Assistant District Attorney, Harris Co.
201 Fannin
Houston TX 77002

RE: CASE NO. 14-82-00589-CR
TRIAL COURT CASE NO. 359,431

STYLE: Pope, Benjamin Allen
v: The State of Texas

Please be advised that, on this date, the Court OVERRULED appellant's second motion for rehearing in the above cause.

Respectfully yours,

MARY JANE SMART, Clerk

By: /s/ REBECCA McMAHON
Deputy

APPENDIX C

Motion Denied, and Opinion filed August 11, 1983; Opinion on Motion for Rehearing of June 9, 1983 is withdrawn.

NO. B14-82-589CR

BENJAMIN ALLEN POPE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the 177th District Court
of Harris County, Texas
Cause No. 359,431

OPINION ON APPELLANT'S SECOND MOTION FOR REHEARING

Our prior opinion in which we wrote on appellant's first motion for rehearing is withdrawn and the following is substituted therefor.

On the day before our original opinion in this case was issued, the Court of Criminal Appeals handed down its opinion in *Martin v. State,* No. 859-82 (Tex. Crim. App. May 11, 1983) (not yet reported). Since such decision overruled its previous line of cases holding an accused waived his right to appellate review of his rights under the Texas Speedy Trial Act by pleading guilty, it now becomes necessary to address the merits of appellant's third ground of error.

Appellant was arrested on February 19, 1982, and charged by complaint with the felony offense of possession

of the controlled substances methamphetamine, hydromorphone, and marijuana. He appeared in the 177th Judicial District Court on February 22, 1982 for a probable cause hearing. The following chronology is what occurred thereafter:

Date	*Action*
02-22-82	Agreed setting signed by counsel for state and defense setting matter for examining trial on 2-26.
02-26-82	Agreed setting for presentation to grand jury on 3-5 and arraignment on 3-10.
03-10-82	Agreed setting for arraignment on 3-24.
03-25-82	Agreed setting for arraignment on 4-13.
04-07-82	Appellant indicted in Cause No. 350,662.
04-13-82	Agreed setting for pre-trial hearing on 4-22.
04-22-82	Seven pre-trial motions filed, two of which were motions to dismiss on grounds other than lack of speedy trial.
04-22-82	Agreed setting for hearing on motion for 5-25 and trial on 6-28.
06-28-82	Three motions to dismiss filed, one of which was based upon lack of a speedy trial.
06-28-82	Agreed trial setting for 7-12.

Date	*Action*
07-08-82	Appellant reindicted for same transaction under Cause No. 359,431, except that first paragraph alleged possession of cocaine instead of methamphetamine.
07-12-82	Agreed setting for hearing motions on 8-9 and for trial on 8-16.
07-14-82	Six more pre-trial motions filed by appellant, including a motion to dismiss on the basis of lack of a speedy trial.
07-21-82	A notice of intent to introduce copy of letters if original not produced filed by appellant.
07-23-82	Another motion to dismiss (not on basis of speedy trial) filed by appellant.
07-27-82	Three additional motions filed by appellant.
08-09-82	Hearing on apparently all motions including his motion to dismiss for failure to provide a speedy trial.
08-16-82	Motion to dismiss indictment (not on basis of speedy trial) filed by appellant.
08-16-82	Plea of *nolo contendere* entered by appellant and punishment assessed in accordance with plea negotiations.

At the hearing on appellant's speedy trial motion on August 9, 1982, he proved through the clerk's records that neither an oral nor written notice of ready for trial had been filed by the prosecutor in the re-indicted Cause

No. 359,431 and rested. The prosecutor put on no evidence, but when asked by the trial court if he wished to be heard, he responded the court should take judicial notice of all the agreed settings of the case and stated, the "state has been ready for trial within the 120 days as provided by Speedy Trial Act." Based upon the record before us, we are unimpressed with appellant's argument that we cannot accept the unsworn statement of the prosecutor that the state had been ready for trial within the 120-day limit of the Act. No motions were filed on behalf of the state and the first trial setting for June 28, 1982 was made on April 22, 1982, some 62 days after appellant was arrested, well within the 120-day limit. Even if the trial had been conducted on June 28th and that date was outside the 120-day limit, this would not benefit appellant since the requirement of the Act applies to prosecutorial preparedness and does not encompass the trial court and its docket. *Barfield v. State,* 586 S.W. 2d 538 (Tex. Crim. App. 1979). When the prosecutor declared the state had been ready for trial within the 120-day time limit and appellant elicited no evidence in rebuttal thereof, the requirements of the Speedy Trial Act were fulfilled. *Id.* Appellant's third ground of error is overruled.

Appellant contends we were in error in holding that by entering a plea of *nolo contendere* he waived his claim of a denial of a constitutional right to a speedy trial. We agree, as the Court of Criminal Appeals has held otherise. *Riggall v. State,* 590 S.W.2d 460 (Tex. Crim. App. 1979). We will address the merits of appellant's fourth ground of error dealing with his constitutional claim of denial of a speedy trial and apply the balancing test of *Barker v. Wingo,* 407 U.S. 514 (1972). The four factors

to be weighed in determining whether an accused has been denied his right to a speedy trial are: (1) length of delay, (2) reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. *Id.* According to the teaching of *Barker*, the four factors are to be considered together and each case is to be judged on an ad hoc basis.

Looking to the facts of this case, appellant was brought to trial in under six months from the date of the offense. The record does not show the reason for the delay, but from the above chronological history of the case we find the case was active on the court's docket at all times. As to appellant's assertion of the right to a speedy trial, we find he *never* requested a speedy trial but only objected to the lack thereof on June 28, 1982, when the 120-day limit provided by the Speedy Trial Act had expired. Appellant *attempts* to show he was prejudiced by the delay by the following novel reasoning. At the hearing on his motion to dismiss for failure to provide a speedy trial, appellant called the court clerk as a witness and proved the indictment under which the proceedings were had was returned July 8, 1982; it alleged the offense to have occurred on February 19, 1982, which was more than 120 days; and appellant had been continuously in custody since commission of the offense. On cross-examination by the prosecutor, the following occurred:

> Q. Do you have present with you Cause No. 350662, the old reindictment [sic]?
>
> A. [Clerk] Yes.
>
> Q. For the record, you have not been able to locate the docket sheet in Cause No. 350662; is that correct?

A. That is correct.

Q. Also for the record, 359431 is a reindictment of 350662; is that correct?

A. Yes, sir.

MR. MAGIDSON (The prosecutor):
At this time we offer into evidence official records of 350662; more specifically, for the court's attention, all of the agreed reset forms in this case and also the docket sheets, also that. That is all we have.

When the court reporter filed her transcript of the proceedings on September 20, 1982, she included the "reset" forms as an exhibit. Appellant's counsel then presented a motion for a supplemental statement of facts to the trial court, stating that "the state introduced in evidence the entire file in Cause No. 350662," that the court reporter had not included "the entire file in Cause No. 350662 in the Statement of Facts," and that he desired it be included in a supplemental statement of facts. On October 18, 1982, the trial court granted the motion and, consequently, there has been transmitted to this court four large manila envelopes of xeroxed copies of material that has nothing to do with this appeal. However, included with this material is a copy of appellant's "Motion to Set Aside the Indictment Because the State has not Complied with Article 32A.02 of the Texas Code of Criminal Procedure" which was filed on June 28, 1982. This motion, signed only by appellant's attorney and not sworn to by anyone, alleges that the "long delay in bringing [appellant] to trial has caused him to lose the benefit of the testimony of substantially all of his witnesses" since they have now moved and he can not find them. The motion further alleges that "most of those seven

witnesses" would testify to facts which would show appellant was not in possession of the drugs on the occasion in question.

With this factual background, appellant argues, "[W]hen the state introduced the Defendant's Motion to Set Aside the Indictment Because the State has not Complied with Article 32A.02 of the Texas Code of Criminal Procedure in Cause No. 350,662, the first case, the state admitted every fact, statement, and conclusion in that motion, and the contents of that motion are conclusive against the state." We do not agree with appellant's contention that the prosecutor introduced appellant's motion into evidence because the record simply belies this. As we construe that portion of the record quoted above, the prosecutor introduced the agreed reset forms and the docket sheet and appellant's counsel has attempted to expand the prosecutor's offer to include evidence not offered. Because of our holding that the prosecutor did not introduce into evidence the motion to dismiss, we therefore do not address appellant's contention that the state was bound by the assertion made by appellant's counsel in the motion. We hold (1) the length of delay was not unreasonable; (2) in the absence of any showing to the contrary, the reason for the delay is of little consequence because the case was shown to be active at all times on the trial court's docket; (3) appellant failed to show that he ever asserted his right to a speedy trial but, to the contrary, agreed to the continuances causing the delay; and (4) appellant failed to show he was in anyway prejudiced by the delay. Accordingly, we overrule his fourth ground of error asserting a denial of a speedy trial under the Constitution.

The motion for rehearing is overruled.

/s/ Sam Robertson
Associate Justice

Judgment Rendered, and Opinion filed August 11, 1983.
Panel consists of Associate Justices Pressler, Robertson and Cannon. Justice Cannon not participating.

COURT OF APPEALS
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

August 11, 1983

Hon. Dougal C. Pope
Pope & Waits
2317 Bissonnet
Houston TX 77005

Richard Mason
Assistant District Attorney, Harris Co.
201 Fannin
Houston TX 77002

RE: CASE NO. 14-82-00589-CR
TRIAL COURT CASE NO. 359,431

STYLE: Pope, Benjamin Allen
v. The State of Texas

Gentlemen:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause; an Court's opinion was delivered.

Respectfully yours,

MARY JANE SMART, Clerk

By: /s/ REBECCA McMAHON
Deputy

APPENDIX D

COURT OF CRIMINAL APPEALS
OF TEXAS

NUMBER 0887-83

IN THE 14th COURT OF APPEALS

COURT OF APPEALS NO. 14-82-589

POPE, BENJAMIN ALLEN

v.

THE STATE OF TEXAS

O R D E R

The Appellant's petition for discretionary review in the above numbered and entitled cause is refused.

PER CURIAM

Delivered February 8, 1984.

APPENDIX E

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

STYLE: Benjamin Allen Pope
COURT OF CRIMINAL APPEALS NO. 887-83

April 25, 1984

On this day, the Appellant's Motion for Rehearing was denied.

THOMAS LOWE, Clerk

COURT OF CRIMINAL APPEALS
P. O. Box 12308, Capital Station
AUSTIN, TEXAS 78711

MAIL TO: Mr. Dougal C. Pope
Attorney at law
2317 Bissonnet
Houston, Texas 77005

CERTIFICATE OF SERVICE

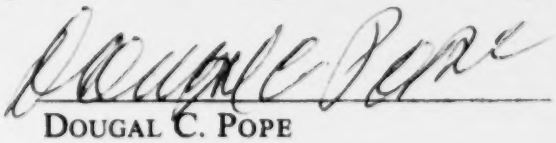
Three copies of the foregoing were served on all parties required to be served and they were mailed to each of the following on the 30th day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelopes:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Mr. Jim Mattox
Attorney General of Texas
P. O. Box 12548
Capital Station
Austin, Texas 78711

Additionally, three copies of the Jurisdictional Statement were served of Jim Mattox, Attorney General of Texas, at the address listed above on the 30th day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelop.



DOUGAL C. POPE

84-982

Office - Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The Court Of Criminal Appeals Of Texas

APPELLANT'S MOTION FOR LEAVE TO FILE HIS APPEAL AND HIS JURISDICTIONAL STATEMENT

DOUGAL C. POPE
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The
Court Of Criminal Appeals Of Texas

APPELLANT'S MOTION FOR LEAVE TO FILE HIS APPEAL AND HIS JURISDICTIONAL STATEMENT

To The Honorable Court:

Now comes the Appellant and files this his Motion for Leave to File his Appeal and his Jurisdictional Statement and as grounds therefor says as follows:

1.

The appeal involves the question of whether the cocaine portion of the Texas Controlled Substance Act[1] is unconstitutional. Since the Act does not provide sufficient standards or the elements necessary to define cocaine, that Act violates the due process clause of the Fifth and the Fourteenth Amendments of the United States Constitution.

2.

Appellant was indicted for the possession of cocaine. Prior to the trial of his case in the 177th Judicial District Court of Harris County, Texas (Trial Court), the Appellant filed his First Motion to Dismiss the Indictment which was presented to and heard by the Trial Court prior to the Appellant's announcement of ready for trial. That Motion to Dismiss alleged that Article 4476-15 of Vernon's Annotated Texas Civil Statutes was unconstitutional as it applied to cocaine. That Motion pointed out that the Statute did not define what constitutes the contents or the elements of cocaine and that the Statute does not set out any standards as to what constitutes cocaine. The way the Statute is written a person must speculate as to whether a particular substance or compound would constitute cocaine. That Motion quoted as authority the cases of *Dunn v. United States,* 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) and *United States v. Harris,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

The Trial Court overruled the Appellant's Motion to Dismiss and thereafter, the Appellant entered his plea

1. Article 4476-15, Sections 2.01, 2.02 and 2.04(b)(4) of Vernon's Annotated Texas Civil Statutes.

of nolo contendere and he was sentenced to two years in the Texas Department of Corrections.

3.

Appellant timely filed his Notice of Appeal to the Court of Appeals of the Fourteenth Supreme Judicial District of Texas (Court of Appeals) and the question of whether the cocaine portion of the Texas Controlled Substance Act was constitutional was presented to that Court in Point of Error No. 5. The Court of Appeals affirmed the conviction and held that the Statute was constitutional. The opinion of the Court of Appeals is reported at 667 S.W.2d 163. Thereafter, the Appellant filed his Petition for Discretionary Review with the Texas Court of Criminal Appeals (Court of Criminal Appeals), the highest Texas court for criminal matters, and that Court refused to grant discretionary review. Thereafter, Appellant filed his Motion for Rehearing, and the Court of Criminal Appeals denied that Motion for Rehearing on April 25, 1984. On or about May 14, 1984, Appellant filed his Notice of Appeal to the United States Supreme Court in both the Court of Appeals and the Court of Criminal Appeals as he was uncertain in which court that the Notice of Appeal should be filed.

4.

This Court has jurisdiction of this appeal under the provisions of 28 U.S.C. Section 1257(2) which provides:

> Section 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

5.

The portions of Article 4476-15 of Vernon's Annotated Texas Civil Statutes involved in this proceeding are as follows:

SUBCHAPTER 2, STANDARD AND SCHEDULES

Controlled substances

Section 2.01. The legislature determines that the substances listed in Schedules I, II, III, IV, and V and in Penalty Groups 1, 2, 3, and 4 shall be controlled substances.

Nomenclature

Sec. 2.02. The controlled substances listed or to be listed in the schedules in Schedules I, II, III, IV, and V and Penalty Groups 1, 2, 3, and 4 are included by whatever official, common, usual, chemical or trade name they may be designated.

* * *

Schedule II

Sec. 2.04. (a) Schedule II shall consist of the controlled substances listed in this section.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, however produced:

* * *

(4) Cocaine, including its salts, isomers (whether optical, position, or geometric) and salts of such isomers; coca leaves, and any salt, compound, derivative, or prepa-

ration thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

6.

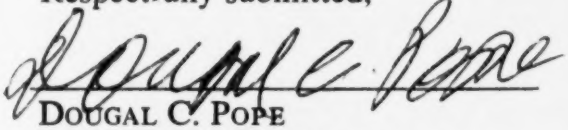
Appellant is challenging the constitutionality of Article 4476-15, Section 2.02 and Section 2.04(b) of Vernon's Annotated Texas Civil Statutes which covers cocaine. Those sections of the Statute do not provide sufficient standards or the elements necessary to define cocaine, and this is a violation of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and of the Texas Constitution.

7.

Appellant is filing his Jurisdictional Statement with this Motion.

Wherefore, premises considered, Appellant asks this Court to hear this appeal and hold that the Texas Controlled Substance Act, Article 4476-15, as applied to cocaine is a violation of the Appellant's due process rights and that the Statute is unconstitutional and that Appellant's conviction be reversed and the Indictment dismissed and that he have such other and further relief to which he may be entitled.

Respectfully submitted,



DOUGAL C. POPE
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

CERTIFICATE OF SERVICE

Three copies of the foregoing were served on all parties required to be served and they were mailed to each of the following on the 16 day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelopes:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

Certified Mail #3881872
Return Receipt Requested

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Certified Mail #3881873
Return Receipt Requested

Dougal C. Pope

DOUGAL C. POPE